

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

ANDRONACO, INC. d/b/a  
ANDRONACO INDUSTRIES  
Respondent

and

Case No. 07-CA-160286

LINDSEY JOHNSTON<sup>1</sup>  
an Individual

*Colleen Carol, Esq.*  
for the General Counsel.

*Timothy J. Ryan, Esq.*  
for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried before me in Grand Rapids, Michigan on March 3, 2016. Charging Party Lindsey Johnston (Johnston) filed the charge against Respondent Andronaco, Inc. d/b/a Andronaco Industries (Respondent) on September 18, 2015<sup>2</sup> and the General Counsel issued the complaint on November 24. Respondent filed a timely answer on December 7.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining several overly broad handbook rules. These rules include disclosure of confidential company information, solicitation and distribution, dress code, and an internet/email rule. Also alleged are two violations of Section 8(a)(1): interrogating an employee about concerted activities; and accusing an employee of disloyalty because of protected concerted activities. Lastly, the complaint alleges that Respondent terminated Johnston because she engaged in protected concerted activities. Respondent admits to maintaining the rules and terminating Johnston, but denies any wrongful conduct.

I find that the handbook rules and accusation of disloyalty violate Section 8(a)(1). I do not find that Respondent violated the Act by interrogating an employee. I ultimately find that Johnston's discharge also violated Section 8(a)(1).

---

<sup>1</sup> Johnston was married on July 31, 2015 and many of the documents in the record reflect her previous name, Lindsey Ball. For simplicity here, she will be referred to as Johnston.

<sup>2</sup> All dates are in 2015 unless otherwise indicated.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Respondent, I make the following

### FINDINGS OF FACT<sup>3</sup>

#### I. Jurisdiction

Respondent admits, and I find, that it has been a corporation with an office and facility in Kentwood, Michigan and has been engaged in the manufacture and nonretail sale of specialty systems for the pharmaceutical, chemical, steel, wastewater and energy markets. During the past 12 months, in conducting its business, Respondent purchased and received at its Kentwood facility, goods valued in excess of \$50,000 directly from points outside the State of Michigan.

#### II. Background

Respondent maintains manufacturing facilities in Kentwood, Michigan and in France. Ron Andronaco is the owner and chief executive officer (CEO). Kaila Schweda,<sup>4</sup> the executive assistant, worked as the human resources person from March until mid-July. Cheryl Sarver took over the human resources function in mid-July. Schweda reports to Scott Palmittier, the chief financial officer (CFO), except when performing human resources work. When performing HR work, Schweda reports to CEO Andronaco.

Also reporting to Andronaco are CFO Palmittier, Plant Manager Colin Cruttenden, and the director of engineering. (Tr. 195).

---

<sup>3</sup>Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When there is a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006).

<sup>4</sup> Schweda married after the events in this matter. All relevant documents are signed in her maiden name instead of her married name.

### III. Handbook Rules

Respondent maintains a handbook for its employees. (GC Exh. 2). In Section IV, Employee Conduct, Part A, Employee Conduct Subject to Discharge states that Respondent retains the right to evaluate what employee conduct is disruptive. If Respondent determines the conduct is unacceptable, it has the sole right to give disciplinary action, up to and including termination. The rules at issue involve confidentiality, solicitation/distribution, dress code, and internet and email usage.

#### A. Applicable Standard for Reviewing Rules

“In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Hyundai America Shipping Agency*, 357 NLRB 860 (2011). “Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (footnote omitted), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). “In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

If the rule explicitly restricts Section 7 rights, it is unlawful. *Id.* at 646. If it does not, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. Ambiguous rules are construed against the drafter of the rule. *Flex Frac Logistics, LLC*, 358 NLRB 1131, slip op. at 2 (2012), remanded on other grounds, 360 NLRB No. 120 (2014), *enfd.* 746 F.3d 205 (5th Cir. 2014).<sup>5</sup>

Here, none of the rules were promulgated in response to union activity or applied to restrict Section 7 rights. In addition, Respondent presented no evidence regarding any rationale for these rules. Therefore, all rules are examined to determine whether an employee could reasonably construe the language to prohibit Section 7 activities. *Lily Transportation Corp.*, 362 NLRB No. 54 (2015).

#### B. Confidentiality

In the handbook’s Section IV A., Employee Conduct Subject to Discharge (GC Exh. 2), Respondent’s rule provides a non-exclusive list of employee offenses subject to termination. One of the terminable offenses listed is: “Disclosure of confidential Company information . . . .”

---

<sup>5</sup> The first *Flex Frac* decision was issued by a Board panel whose members included two persons whose appointments to the Board were considered invalid. *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Before *Noel Canning* issued, the United States Court of Appeals for the Fifth Circuit enforced the Board’s Order and no question exists regarding the validity of the court’s judgment. See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1, fn. 2 (2015).

This particular rule violates Section 8(a)(1) of the Act. An employer may legitimately require confidentiality rules in appropriate circumstances. However, the employer must attempt to minimize the impact of such a rule upon protected activity. *Boeing Co.*, 362 NLRB No. 195, slip op. at 1 (2015).

5 This rule does not define what confidentiality is. When the rule fails to present “accompanying language that would tend to restrict its application,” employees reasonably could assume that protected concerted activities, such as discussing wages, hours and terms and conditions of employment, are included in the prohibition. *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 and fn. 3. Nothing in this rule minimizes the impact upon employees’ Section 7  
10 rights and therefore Respondent’s rule violates Section 8(a)(1).

### C. Solicitation/Distribution Rule

Section IV, Part B, Solicitation and Distribution, states:

15 No employee solicitation of any kind is permitted in working areas of the Company. In addition, the distribution of any and all non Company literature is prohibited.

20 Solicitation and distribution are not the same in the legal sense. Traditionally “solicitation and distribution of literature or *different* organizational techniques and their implementation pose[d] *different* problems both for the employer and for employees.” *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962) (emphasis in original). Solicitation is viewed as an oral request; distribution is considered handing out literature. *Id.* at 617–618. Because of the difference in legal concepts, the solicitation sentence is analyzed separately from the distribution sentence.

25 An employee may solicit for Section 7 concerns outside of working hours. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249, reh’g denied 968 F.2d 18 (5th Cir. 1992), cert. denied 506 U.S. 985 (1992). Rules prohibiting solicitation during working time are presumptively lawful because “. . . that term denotes periods when employees are performing  
30 actual job duties, periods which do not include the employee’s own time such as lunch and break periods.” *Our Way*, 268 NLRB 394, 394–395 (1983).

35 An employer may ban solicitation in working areas during working time; however, the ban cannot be extended to working areas during nonworking time. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011). A solicitation rule is presumptively invalid when solicitation is prohibited during the employee’s own time. *Our Way*, 268 NLRB at 394.

Respondent’s no-solicitation rule prohibits solicitation in the working areas of the company, without regard to whether employees are taking breaks in the area. Because the rule does not extend to nonworking time in work areas, the solicitation rule is overly broad and violates Section 8(a)(1). *UPS Supply Chain*, *supra*.

40 The distribution portion of the rule also is overly broad. A rule that prohibits distribution literature on employees’ own time and in nonworking areas is presumptively invalid. *Id.*, citing *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001). In *Trus Joist MacMillan*, 341 NLRB 369, 372 (2004), a rule that prohibited distribution of literature in all working areas and all areas of

plant property violated Section 8(a)(1). At this point, Respondent must show that the rule was communicated or applied the rule to convey “a clear intent to permit distribution of literature in nonworking areas during nonworking time.” *Trus Joist MacMillan*, 341 NLRB at 372, citing *Ichikoh Mfg.*, 312 NLRB 1022 (1993), *enfd.* 41 F.3d 1507 (6th Cir. 1994).

Respondent’s distribution rule prohibits distribution of any literature, at any time, at any place, unless it is Respondent’s literature. It has no exception for distribution in break areas or on the employees’ own time. As Respondent provided no evidence of any attempts to clarify this rule or show it permitted distribution in nonworking areas during nonworking time, employees could reasonably construe the language to prohibit all permissible distribution of Section 7 materials.

#### D. Dress Code

Respondent’s Dress Code for Shop Employees, Section V, Part H, includes dress codes separately for shop employees and non-shop employees. However, both dress codes include the following language:

As per our policy, clothing with words, slogans and/or pictures that may be offensive to other employees or guests of the company may not be worn. We are all concerned about our team members’ personal comfort while working, but understandably, we are all concerned about, and must give preference to, personal safety.

The Dress Code restrictions are impermissibly broad. Under Section 7 of the Act, employees have the right to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Insignia related to Section 7 rights are necessarily included. “The test is whether the insignia prohibition reasonably tends to interfere with the free exercise of employee rights under the Act.” *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 6 (2014), quoting, *inter alia*, *St. Luke’s Hospital*, 314 NLRB 434 fn. 4 (1994).

When restricting employees’ dress, a rule that limits employees’ Section 7 rights must be narrowly tailored to the circumstances. *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015). Respondent has the burden of proof to show that special circumstances permit the restrictions and that the rule is narrowly tailored to those special circumstances. *W San Diego*, 348 NLRB 372 (2006) (special circumstances demonstrated to limit wearing union pins if in the hotel’s public areas, but not while in private areas of the property). Circumstances that could justify dress code restrictions include jeopardizing employee safety, potential damage to machinery or products, exacerbation of employee conflicts, or unreasonably interfering with the Respondent’s public image. *Lily Transportation*, 362 NLRB No. 54, slip op. at 6, and cases cited therein.

Although the two dress codes differentiate between office workers and line workers, both apply the same restrictions on content. Respondent’s rule is directed towards the possibility of offending someone. Although the rule cites safety concerns, none are apparent from the face of the rule and Respondent presented no supportive evidence to show such concerns. Respondent also does not demonstrate that any conflicts existed between employees or any interference with Respondent’s image. Respondent presents no information about employees in the public eye,

where a restriction on message might be valid, versus those working in production, where a restriction on message is likely invalid.

The dress code is not narrowly tailored and is broadly applied. An employee reasonably would consider that the dress code prohibited messages about a union or other protected concerted statements. The rule therefore is overly broad and violates Section 8(a)(1) of the Act. *Boch Honda*, 362 NLRB No. 83, slip op. at 2.

#### E. Internet/Email Rule

Respondent's internet and email use policy, in relevant part, states:

As the use of the internet and email becomes a great business tool for our company it can also be a potential threat to the company. It can lead to system viruses, legal liabilities, confidentiality breaches, lost productivity, and network congestion and could cause damage to our reputation. Because of this we are instituting written corporate rules and guidelines on the use of the organization's email and internet systems.

**1. Internet use** is strictly limited to business during business hours. The company will allow you to use the internet when you are not on company time (before or after work or on your lunch period). However, you are prohibited from visiting sites which are offensive about race, gender, age, sexual orientation, pornography, religious or political beliefs, national origin or disability and downloading data or signing up on websites that would cause spam (solicitations) to be sent to our systems.

**2. Email use** is strictly limited to business use and should always be written in a professional manner. The company will allow you personal use of the email system for brief communications between work and your home or in the case of personal emergencies. You are strictly prohibited from creating or distributing any offensive, or disruptive messages, including messages containing offensive comments about race, gender, age, sexual orientation, pornography, religious or political beliefs, national origin, disability or copyright infringing material.

**3. Reporting.** If you should receive any emails with any of the above content you should report the matter to your supervisor immediately. You should also write the alleged act immediately (within 24 hours) and give a copy to the company President.

By publishing these rules, Respondent has put in issue whether employees have access to the internet and email. Respondent did not contend that employees do not have access to the computer systems. Employee Johnston had access to her personal email during this time. Johnston also had a company email address.

## 1. Internet rule

Regarding internet access, the test is whether an employee would reasonably interpret the rule to encompass protected activities. *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 6 (2014). I find three particular areas in which employees could not reasonably discern whether their Section 7 rights were undermined. However, the portion of the list addressing limiting access to offensive sites, including political sites, appears lawful.

First, regarding the unlawful areas, the rule would be confusing to an employee because it states that employee cannot use the internet on company time, then parenthetically defines non-company time as before or after work or during lunch. It says nothing about breaks. The rule does not identify working time, which is lawful, instead of company time, which is unlawful. Because an employee reasonably would not know when access to the internet would be permissible, the rule is overly broad.

Secondly, the rule defines “spam” as solicitations. The reference to solicitations is troublesome. One man’s spam is another man’s updates promoting employees’ Section 7 rights and encouraging participation in those activities.

Because the term “solicitation” is not defined further, Section 7 information and activities are included as spam. Respondent provided no evidence of special circumstances to support this restriction. As employees are permitting internet access and Respondent provides no evidence of special circumstances, the spam restriction and its definition as solicitation are overly broad. *UPMC*, 362 NLRB No. 191, slip op. at 4–5 (2015).

Thirdly, the internet rule also limits usage by “copyright infringement.” In *UPMC*, 362 NLRB No. 191, slip op. at 2 fn. 5 and at 25, and cases cited there, provisions that prohibited employees from using Respondent’s trademarks, or post copyrighted information in documents containing its name, trademark, or logo, on any personal blogs or other online sites, were overbroad. The restriction on copyright infringement also violates the Act.

The list of offensive sites is otherwise lawful. Respondent cites to *Fiesta Hotel Corp. d/b/a Palms Hotel & Casino*, 344 NLRB 1363 (2005). The rule in that case banned employee conduct that had the effect of being “injurious, offensive, threatening, intimidating, coercing or interfering with team Members or patrons.” *Id.* at 1367–1368. That case further provided a reminder not to read the rule without context. I concur. Because the term “offensive” is further defined by a list that generally does not interfere with Section 7 rights, this particular portion of the rule did not violate Section 8(a)(1).

## 2. Email rule

Email systems usage is not treated as just solicitation or distribution due to their unique features. It may defy classification as a work or non-work area. Employees who have “rightful” access to their employer’s email system for work purposes also have the right to use that system for Section 7 communications during nonworking time. *Purple Communications*, 361 NLRB No. 126, slip op. at 14 (2014).

To rebut the presumption that employees have a right to access the employer's email system during nonworking time, an employer justifies restricting these rights by demonstrating that special circumstances are necessary to maintain production or discipline. The employer's restrictions should be based upon the nature of its business. The restrictions also should be narrowly tailored to meet the employer's special circumstances and still balance with employees' Section 7 rights. Further, the restriction must be uniform and consistently enforced. *Purple Communications*, supra.

Respondent's limitations upon email usage are overly broad. The limitations give personal use only for emergencies. An employee would not reasonably know that he could use email during non-working times for Section 7 communications. Respondent presents no special circumstances to limit use to personal emergencies only. Therefore, the email rule violates Section 8(a)(1).

### 3. Reporting requirement

Because the email and internet sections are unlawful, the reporting requirement also is unlawful. *UPMC*, 362 NLRB No. 191, slip op. at 5. In *UPMC*, the reporting requirement was even more narrow—limited to solicitation from an email. Because the rules already could reasonably be interpreted to limit Section 7 activities, requiring employees to report such activity also infringes upon their Section 7 rights and violates Section 8(a)(1). *Id.*<sup>6</sup>

## IV. Johnston's Termination and Alleged Section 8(a)(1) Statements

Johnston, an administrative assistant and receptionist, was terminated on August 14. She was supervised by Schweda, the executive assistant who also completed accounts payable and sometimes filled in as human resources director. Johnston began working for Respondent in December 2012. Johnston's duties included sitting at the reception desk, greeting people as they arrived, answering the telephone and entering data for bills and accounts receivable. She also maintained a stock of office supplies.

### A. Johnston in the Middle Between Respondent and Former Employee Nate Barrett

During the spring and summer of 2015, Johnston planned her wedding. She asked another employee, Nate Barrett, to assist her with the invitations. Barrett worked for Respondent from October 2011 until his resignation, effective May 29. (Tr. 28). At the time he left employment there, he worked in graphic design and information technology (IT). He was supervised by Rick Vining. (Tr. 28).

Johnston testified without contradiction that, after Barrett left employment, Vining asked her several times if she was still in touch with Barrett. Johnston learned that Barrett had not received his last paycheck. At some point, Vining told Johnston to text Barrett about the

---

<sup>6</sup> If Respondent promulgates a lawful policy, the reporting requirement would then be lawful. *UMPC*, supra, slip op. at 5 fn. 14.



paycheck. Johnston could not recall exactly when Vining told her to text Barrett about his final check.

Barrett testified without contradiction that Vining repeatedly contacted him in June and July. The problems with the last paycheck arose because of events on Barrett's next to last day of work. Barrett maintained that, in 2014, another IT employee told him the salaries and wages of other employees, including CEO Andronaco and Schweda. On May 24, Barrett told another employee, Scott Cascaden, about wage information he said he received from another IT employee in the previous year. The information included Cascaden's own wages, but Barrett denied having any documentation.<sup>7</sup> Cascaden immediately reported the conversation to his supervisor, who then told Andronaco. That same day, Andronaco called Barrett into his office. With Vining, Schweda and Plant Manager Colin Cruttenden present, Andronaco questioned him about whether he had access to the administrative password to obtain such confidential information. (Tr. 179-180). Barrett denied having any other information, including the password. Andronaco demanded that he sign an affidavit saying so, but Barrett declined. (Tr. 182). When Barrett was no longer employed by Respondent, Vining telephoned him again and again about the other discussions of wages and asking for an affidavit. Barrett declined to do so.

On July 21, almost 2 months after he left Respondent's employ, Barrett, by email, contacted Schweda and Johnston about trying to make arrangements to receive his final paycheck. He requested that the paycheck be mailed to him due to his work schedule. An email exchange ensued between Schweda and Barrett, but excluded Johnston. Schweda, by email, said that he needed to come in to the office to sign a release. Barrett replied to Schweda that he contacted the Michigan Department of Labor, which informed him that he was not required to sign any documents to receive his final paycheck. Schweda advised Barrett that he violated Respondent's confidentiality agreement and Respondent had the right to pursue legal action against him. Schweda again insisted that Barrett needed to come to the office to obtain his check and Respondent would be flexible in scheduling with him. (GC Exh. 4). Instead of continuing the discussion with Schweda, on July 21, Barrett filed a final paycheck recovery charge against Respondent with Michigan's Labor department, Wage and Hour division. (GC Exh. 5).<sup>8</sup>

On about August 7, Respondent filed a lawsuit and demanded injunctive relief against Barrett. (GC Exh. 7). The suit maintained that Barrett violated Respondent's confidentiality agreement and specified Barrett had wage information for Respondent's employees.<sup>9</sup> Notably, the suit maintained irreparable harm would come from release of wage information "when disclosed to other employees." Barrett testified he was served after August 7, but probably no

---

<sup>7</sup> Respondent, using Barrett's words, says the discussion with Cascaden was "water cooler talk." However, Barrett's terminology does not bind me to that legal conclusion.

<sup>8</sup> On July 22, Barrett also filed an unfair labor practice charge, alleging Respondent maintained and enforced rules that prohibited employees from discussing wages.

<sup>9</sup> Barrett filed a second unfair labor practice charge, alleging Respondent's action was filed in retaliation for discussing wages. Both charges were withdrawn when the lawsuit was settled and Barrett signed an affidavit.

later than August 13. He further testified that he “probably” told two people about the suit: Johnston and another employee, Robert Zurida.<sup>10</sup>

#### B. Johnston Returns from Her Honeymoon and Learns Respondent is Suing Barrett

Johnston was married on Friday, July 31. Andronaco and the CFO granted her request to take off three additional days after her wedding and she returned to work the following Thursday.

After Johnston returned from her honeymoon and returned to work, Barrett sent Johnston a text message, stating that Respondent was suing him. Respondent’s documentation shows that on Friday, August 7, Johnston approached Vining, Barrett’s former supervisor, and asked him if he knew what was happening with Barrett. According to Schweda’s subsequent email, Johnston apparently told Vining she was upset about the suit, was thinking about quitting, and said she would call Barrett that night to find out what was happening. (GC Exh. 11).

According to Johnston, on about August 12, Vining asked Johnston, while she was working at the front desk, if she spoke with Barrett. She said she had. According to Johnston, Vining asked if she knew what was going on with Barrett and Respondent. She said Barrett told her something and it was above her head. Vining said ok and walked into Andronaco’s office. Johnston also admitted, during cross-examination, that she asked Vining whether she could take Barrett’s check to him. At some point, Johnston said she thought Barrett was in trouble for discussing wages. (Tr. 109).

According to Schweda, Vining told her that Johnston was “gossiping.” Schweda’s email notes, dated August 18, state:

Vining approached [Johnston] on Monday, August 10th to find out how she was in contact with Nate. [Johnston] said Nate asked her to meet up with him for drinks. She was with her mother at the time [on] the phone and her mother advised her NOT to meet up with Nate. Lindsey was no longer mad at Andronaco Industries and changed her mind about her desire to quit.

(GC Exh. 11).

#### C. Respondent Decides to Terminate Johnston

On August 12 or 13, Schweda and Human Resources Manager Sarver spoke with Andronaco about reasons to terminate Johnston. In his testimony, Andronaco said that gossiping was one of the reasons Schweda and Sarver gave him to justify terminating Johnston. Andronaco said other reasons included working on personal items at work, not showing up on

---

<sup>10</sup> General Counsel contends that Respondent’s treatment of Barrett as well as another employee, Zurida, also shows animus. Zurida is a long-time friend of Barrett who also worked for Respondent until the same week as Johnston. Zurida testified he was fired for talking about Barrett’s lawsuit, which Respondent disputes. Without deciding whether Respondent terminated Zurida, I agree with General Counsel that Respondent’s discussions with Zurida show Respondent was intensely concerned whether Barrett released information about pay and whether other employees learned of the suit.

time, and absenteeism, although he said these may have not been all the reasons. (Tr. 194). Schweda's testimony did not mention that she discussed the termination with Andronaco and Human Resources Manager Sarver was not called to testify.

5 Although Sarver and Schweda intended to terminate Johnston at the end of the work day on August 14, other circumstances intervened. Johnston, who was aware she had attendance issues, asked Sarver if she could leave early because her grandfather was dying. Sarver said she would check with Schweda because Schweda was her supervisor. Johnston returned to her post at the front desk. Sarver and Schweda then decided to terminate Johnston earlier in the day so  
10 she could leave.

Johnston testified that Sarver called Johnston back to her office. Schweda was present. According to Johnston, Schweda said that they knew she was talking with Nate Barrett and "[W]e can't trust your loyalty with the Company. We're going to have to let you go." (Tr. 87).  
15 Schweda stated she "maybe" said something about loyalty and then denied it. Johnston protested that she told Vining that she did not know anything about it and did not want to talk about it at work.

Sarver then said, "Well, there may be performance-based issues leading up to this as well." Johnston denied the problems and pointed out she had just added her husband to her benefits. Neither Schweda nor Sarver said anything. Johnston said, "What do I do now?" Sarver said she would take her back to the front desk to collect her belongings and walk her to the time clock.

25 Schweda testified that, after Johnston came to the office, Schweda started the conversation. Schweda told her that they intended to terminate her at the end of the day, but because Johnston needed to be with her family, they were terminating her at that time. Schweda said, "I understand you've been gossiping about a lawsuit. That's not ok. You know, we can't trust you. We've had trust issues in the past. This just is kind of one more thing." Johnston  
30 started crying. Schweda said Johnston then asked if it was because of what she said to Rick Vining or because she was friends with Barrett. Sarver said she was not terminated because she was friends with Nate, but because of consistently bad performance. Schweda testified, because Johnston was crying, she never reached the performance issues, including that Johnston was working on personal work during working time. Schweda also testified that she maybe used a term like "disloyal" but then denied it. (Tr. 154). However, her email report of the termination,  
35 dated August 18, reported that, because of Johnston's involvement with Barrett's suit:

[S]he lost our trust and we didn't feel that she was loyal to the company. We felt that she was acting as an advocate for Nate and attempting to get information out of Rick Vining to pass along to Nate. Lindsey should have contacted a supervisor and/or Ron Andronaco when Nate contacted her regarding this issue, rather than trying to get information from Rick Vining.

(GC Exh. 11).

#### D. Respondent Contends Johnston Was Terminated Due to Performance Issues

5 Schweda testified that she had been trying to get Johnston fired for a year due to attendance and performance issues.

10 Johnston had attendance problems in 2014 and 2015. For example, Johnston did not come to work because, post-tornado, she had to clean up the flooded basement and caved-in roof of the house where she lived and the following day could not go to work because the cars were blocked. On July 8, 2014, Schweda, by email, documented that she discussed the attendance issue with Johnston. Schweda concluded: "This meeting was not to tell Lindsey it was her last straw. It was to reiterate how important her position is and to ask that she makes being at work more of a priority." (R. Exh. 1).

15 In January 2015, Schweda started a list of brief anecdotal notes on Johnston's conduct. The first anecdotal note reflects that Johnston did not punch out on January 6. Johnston received no discipline.

20 The attendance and performance concerns were noted in Johnston's performance reviews. For her last performance appraisal, dated February 19, Schweda marked Johnson as "poor" on willingness to take more responsibility as well as reliability. The reliability marks were due to attendance problems. Schweda rated Johnston as average in skill in planning and organizing, related to personal work, communication and adeptness at analyzing facts and problem-solving. She received "exceeded" rating for possessing the knowledge and skill to perform work, which included a comment about "great personality." She also had "exceeded" ratings for keeping work area clean and "consistently produces product that meets the company's high quality standards." None of the categories were marked at the highest level, outstanding. At the conclusion of the appraisal, Schweda noted that Johnston needed to improve her attendance and "no personal matters on business time." (R. Exh. 5).

30 In late winter or early spring of 2015, Respondent permitted Johnston to use leave for family issues without any consequences to her attendance requirements. On May 1, the anecdotal notes reflect that Schweda gave Johnston an email "friendly reminder" about forgetting to clock in and out.

35 In May, Andronaco gave Johnston an additional raise. Andronaco called Johnston into his office after discovering her resume on the internet. He asked what the company could do to keep her there. She replied that she had no further responsibilities coming to her and she thought she had hit a plateau. Andronaco told her to let him know what he could do. After lunch, 40 Johnston returned to Andronaco's office and asked for a raise, which she received. Her pay went from \$13.00 to \$14.50 per hour. (Tr. 77-78; GC Exh. 10).

45 Schweda testified that she told Andronaco she did not agree with the pay raise. She further testified that Andronaco said he gave the raise because, if Johnston left, Schweda would need to perform additional duties.

After she received her raise in May, Johnston also received discussions about her conduct. On June 5, she received a warning for failing to clock in. (R. Exh. 2). On another occasion, Johnston parked her car by the front entrance, ran in and clocked in, and then parked her car. Plant Manager Cruttenden observed Johnston and discussed her conduct with her. Had Johnston parked in the first place where she should have before she clocked in, she would have been tardy. Schweda made an anecdotal note of the incident.

Within two weeks before her wedding, Johnston had two visitors at her reception area. The first visitor, on July 17, was a former employee who Johnston hired to be her wedding videographer. Plant Manager Cruttendon recognized the former employee at Johnston's reception desk and estimated he was present for 20 to 30 minutes. On the same day, Cruttendon told Johnston that she needed to limit her non-work business and get back to work. Schweda entered a note to her anecdotal list.

On July 23, Cruttendon and Schweda saw that Johnston had another guest at her reception desk for approximately 30 minutes. Johnston said the visitor was her sister-in-law, who was trying to sell cleaning services.

On July 28, Schweda spoke with Johnston about have more than one personal visitor per week and clocking in early. Regarding clocking in early, Johnston received 30 minutes of unapproved overtime. (R. Exh. 3).<sup>11</sup> However, Schweda did not discipline Johnston.

Respondent also contends that Johnston's conduct of August 12 was the proverbial straw that broke the camel's back. On August 12, Johnston worked on a single-spaced document on her computer screen in the computer program Word. The letter, to a bridal dress company, discussed Johnston's problems with receiving her wedding dresses and inconveniences to herself and the bridesmaids. Johnston contended that she wrote the letter on about August 11, emailed the letter to her mother on August 11 or during her lunch hour on August 12. Her mother supposedly emailed back the letter with a few changes. Johnston said she saved her letter to the work computer on August 12.

Walking by Johnston's work area several times during the day to deal with invoices and paperwork related to her position, Schweda saw a long document on Johnston's computer screen. Although Schweda could not precisely discern what the document was, she noticed that Johnston was working on the letter instead of her assignment, matching purchase orders to a stack of invoices. Schweda spoke with Cheryl Sarver, who was new to the organization. They agreed that the proper course of action was to terminate Johnston on August 13. Schweda testified that the letter, which she did not see until after Johnston was terminated, was the "last straw."

On the day of hearing, Respondent instructed Vining to search Johnston's Word and email files. Vining then presented at hearing documents that reflect that Johnston's mother did not send an email to her that day. It also reflects that, on August 12, the bridal dress company sent Johnston an email asking for a recommendation. (R. Exh. 11).

---

<sup>11</sup> Johnston hedged on whether Schweda spoke with her on July 28. Johnston then testified she was never told that overtime needed to be pre-approved and she did not think a half-hour of overtime would be an issue because of her attendance problems. (Tr. 115-116). I credit Schweda and the email.

## E. Analysis

5 In examining the situation here, I will first discuss the credibility of witnesses, the alleged Section 8(a)(1) violations, and then Johnston's termination itself.

### 1. Credibility of the witnesses

10 Johnston denied that Schweda was her supervisor. Regarding the four-page letter, Johnston testified it came from her mother, almost completed, and she worked very little on it over the two days. However, the documents Respondent provided showed Johnston received the letter from the bridal company and not from her mother. The computer history of documents also showed that Johnston made some changes in the letter, but the search does not show what changes were made.

15 On the other hand, Schweda testified credibly about the termination interview in which she first said Johnston was "gossiping." Schweda's notes in GC Exh. 11 all turn upon Johnston's interest in Respondent's suit against Barrett as well as Respondent's interest in what Johnston knew.

20 I also credit that Schweda sincerely wanted to terminate Johnston all year. Her tone of voice was consistent with her frustration with Johnston's conduct. Respondent did not ask Vining any questions about his role in reporting his conversations with Johnston to Andronaco and I must assume that his testimony would not support Respondent's cause.

25 General Counsel points out that Schweda's documentation regarding the August 7 conversation between Vining and Johnston is not likely as the suit was not filed until August 7 and Barrett received service sometime thereafter. In addition, no one testified about that conversation and that, as a result, the conversation likely did not take place. (GC Br. at 8, fn. 5). Vining, who was called to discuss other issues, was not asked anything about speaking with Barrett or Johnston. I agree that the conversation was unlikely, yet the documentation demonstrates animus, as discussed below.

30 Andronaco testified that he was concerned that Barrett had access to confidential information but unconcerned about the wage information. Andronaco's voice became a little steely when he denied that the lawsuit was related to discussion of wages. Andronaco's denial is also undermined by the contents of the pleadings in Respondent's suit, which discussed for about a page that the confidential information allegedly accessed included wages, salaries and bonuses.

35 I cannot credit Andronaco regarding the discussion with Schweda and the list of reasons for terminating Johnston. First, Schweda intimated that she and Sarver were solely responsible for deciding to terminate Johnston, but Andronaco himself said they presented reasons for termination. As Vining did not testify regarding his conversations with Johnston, he did not deny that immediately after questioning Johnston, he went to Andronaco's office. Further, despite Schweda's protest about Johnston's performance problems, Andronaco gave Johnston a raise only 3 months before her termination. However, when the lawsuit coincidentally was at issue, he

agreed to terminate Johnston. In contradiction to the testimony provided by Schweda and Andronaco, Schweda's email notes, dated August 18, also only discuss what was relevant to Johnston's involvement with Barrett's suit and nothing about her performance issues.

2. Analysis of alleged Section 8(a)(1) violations: interrogation and disloyalty

Respondent contends that the alleged interrogation was not included in the charge and therefore not a matter of the hearing. General Counsel contends that the statement is included in the facts leading up to Johnston's termination, making the statement closely related to the termination and therefore properly included.

a. Section 8(a)(1) allegations are properly included in the complaint

Respondent contends the Section 8(a)(1) allegations are not properly included in the complaint because they were not included in the charge. Respondent relies upon *Nickles Bakery of Indiana*, 296 NLRB 927 (1989). To be properly litigated, the complaint allegation should "be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge." *Id.* To be considered if not specifically in the charge, Section 8(a)(1) complaint allegations must be closely related to the allegations or subject matter in the underlying charge. *Id.* at 929.

The facts here are closely related to the allegations and subject matter of Johnston's termination. The alleged interrogation led up to Johnston's termination; the statement of disloyalty occurred during the termination itself. Both are closely related and part of the subject matter of the termination. Therefore, I will determine whether these allegations violated Section 8(a)(1).

b. Interrogation

Respondent's own documentation (GC Exh. 11) shows Vining's alleged conversation for August 10 with Johnston. Johnston reported a somewhat similar conversation on August 12. I rely upon Respondent's presentations of Vining's August 10 questioning of Johnston, rather than Johnston's version. Johnston's version was somewhat vague.

Questioning an employee turns into a Section 8(a)(1) interrogation violation when "under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with" Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enfd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered are the background of the questioning, the position of the questioner within the employer's hierarchy, the place and method of questioning, the nature of the information sought, and the truthfulness of the employee's reply. *See Holiday Inn-JFK Airport*, 348 NLRB 1, 4 (2006). Other factors include whether the employer gives assurances against reprisal or provides a reason for questioning the employee. *Id.* *See generally Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964) (setting forth relevant factors for determining if questioning is coercive). Respondent contends that Johnston did not find the conversation coercive and therefore the questioning was lawful. However, the standard is not subjective but objective.

The background of this particular questioning is part of a series in which Vining questioned Johnston about whether she was still in touch with Barrett throughout the summer of 2015. Vining was not Johnston's own supervisor. Vining, as usual, questioned Johnston at her work station. The information Vining sought was about "how" Johnston was keeping in touch with Barrett. Johnston replied honestly, particularly regarding whether she intended to meet Barrett for drinks. Vining apparently gave no reasons for his questioning and gave no assurances against reprisal. Although Respondent's failure to give reasons or assurances support finding coercive interrogation, the remainder of the factors support a finding that it was not coercive. I therefore recommend dismissal of the allegation of interrogation.

c. The accusation of disloyalty in Johnston's termination meeting

I find that the accusation of disloyalty violated Section 8(a)(1). Schweda vacillated on whether she called Johnston "disloyal" during the termination meeting. I do not credit Schweda's ultimate denial.

Statements equating protected activity with disloyalty are generally evaluated with an employer's unlawful interference and coercion related to protected rights. *Carrier Corp.*, 336 NLRB 1141, 1148 (2001) and cases cited therein; *Ferguson-Williams, Inc.*, 322 NLRB 695, 699 (1996). As discussed in more detail below, I find that Johnston was engaged in protected concerted activities, or perceived to be so, and stated that someone is disloyal for doing so violates the Act.

3. Analysis of Johnston's termination

a. Parties' positions

General Counsel contends that Respondent terminated Johnston as a pre-emptive strike, consistent with *Parexel Int'l, LLC*, 356 NLRB 516 (2011). Respondent knew about Johnston's relationship with Barrett and used her as a pawn to retaliate against Barrett and remove "a potential source of future protected concerted activity." (GC Br. at 15, citing *Amptech, Inc.*, 341 NLRB 1131, 1133 (2004), *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), and *Parexel*, supra).

Respondent contends that Barrett was not engaged in protected activities and instead was sued for possible conversion of confidential materials; his activities with Johnston therefore were not protected. Respondent characterizes the relationships as a game of leap frog because Barrett was not involved in protected concerted activity and Respondent's focus was that he had



unauthorized access to the computer system, not because Barrett told Cascaden he knew about wages.<sup>12</sup>

Regarding Respondent's concerns that a confidential employee possibly released confidential information, which was not concerted activity, Respondent cites *Joseph Schlitz Brewing Co.*, 211 NLRB 799 (1974). It also references *Flex Frac Logistics, LLC*, 360 NLRB No. 120 (2014). Respondent further maintains that Johnston historically was a poor worker and she was ultimately terminated due to her activities of August 12—working on a personal letter.

#### b. Applicable law

Terminating an employee for protected concerted activity is unlawful. *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005), enfg. 342 NLRB 316 (2004). Where arguably more than one motive exists for discharge, the mixed motive analysis is applied. The analysis is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. The General Counsel satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003).

If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). An employer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. *Global Recruiters of Winfield*, 363 NLRB No. 68 (2015) (Hirozawa, concurrence), citing *Diversified Bank Installations*, 324 NLRB 457, 476 (1997).

#### c. Prima facie case of termination for protected concerted activity

I find that Johnston was engaged in protected concerted activity and even if she was not, Respondent perceived that she was engaged in protected concerted activity. When an employer

<sup>12</sup> Respondent contends that because the complaint did not specify General Counsel's theory about Johnston's protected concerted activity, particularly her relationship with Barrett, it cannot be litigated. Respondent primarily relies upon two cases: *George Banta v. NLRB*, 686 F.2d 10, 17 (D.C. Cir. 1982), cert. denied 460 U.S. 1082 (1983); and, *United Parcel Service Inc. v. NLRB*, 706 F.2d 972 (3rd Cir. 1983). The standard is stated in *Banta*: The Board is precluded from making findings and orders if the alleged violations are not in the complaint "or litigat[ed] in the subsequent hearing." Id. at 17 (internal quotes and citations omitted). The "Barrett connection" was fully litigated in the hearing.

takes an adverse action based upon its belief, even a mistaken belief, that an employee was engaged in protected concerted activity, it also violates Section 8(a)(1). *Parexel Int'l*, 356 NLRB 516, 519 (2011) and cases cited; also see *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013).

Employee activity is protected under Section 7 of the Act when it is both concerted and for the purpose of mutual aid or protection. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014); *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). Although these elements are closely related, they are analytically distinct. *Fresh & Easy Neighborhood Market*, supra.

i. Concerted activity

The Act protects discussions between two or more employees concerning their terms and conditions of employment. A conversation constitutes concerted activity when “engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees.” *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964)), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005). Also see, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 4. An employee’s subjective motivation for taking action is not relevant to whether that action was concerted. *Id.* Employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. *Id.*, citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Solicited employees do not have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. *Id.* at 6, citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), *Circle K Corp.*, 305 NLRB at 933; *Whittaker Corp.*, 289 NLRB 933, 934 (1988); and *El Gran Combo*, 284 NLRB 1115, 1117 (1987) enfd. 853 F.2d 996 (1st Cir. 1988). Further, the concerted nature of an employee’s complaint is not dependent on the merit of the complaint. *Id.*, citing *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973).

Contemplation of group action is not required in all circumstances. For example, it need not be part of the conversation to invoke the Act’s protection when the discussion is about wages. See, e.g., *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991). Indeed, the Board stated that wage discussions are “inherently concerted.” See *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992). Because wages are a “vital term and condition of employment” and the “grist on which concerted activity feeds,” discussions of wages are often preliminary to organizing or other action for mutual aid or protection. *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds, 81 F.3d 209, 214 (D.C. Cir. 1996); see also *Triana Industries*, 245 NLRB 1258, 1258 (1979) (discussion of wages “is clearly concerted activity”).

The activity between Barrett and Johnston was concerted. As noted in *Fresh and Easy Neighborhood Market*, 361 NLRB No. 12, slip op at 6:

“[M]ak[ing] common cause with a fellow workman over his separate grievance” is a hallmark of such solidarity, even if “only one of them . . . has any immediate stake in the outcome.” *NLRB v. Peter Callier Kohler Swiss Chocolates, Co.*, 130 F.2d 503, 505 (2nd Cir. 1942). By soliciting assistance from coworkers to raise his issues to management an employee is requesting that his coworkers exercise vigilance against the employer’s perceived unjust practices. See *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 fn. 4 (1st Cir. 1988), quoting *J. Weingarten*, 420 U.S. at 260–261. The solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because “next time it could be one of them that is the victim.” *Id.* “An injury to one is an injury to all” is one of the oldest maxims in the American labor lexicon.

A former employee, such as Barrett, is still considered an employee under Section 2(3) of the Act and retains the full protection of the Act. *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989); *Little Rock Crate Co.*, 227 NLRB 1406 (1977). Section 2(3) of the Act defines an employee as “any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .”

An employee is a member of the working class generally, which includes former employees of an employer. *Thomas Steel Co.*, 281 NLRB 389, 392 (1986), citing *Little Rock Crate Co.*, supra. Employees are not protected merely for activity within the scope of their employment relationship, but may engage in other activities for mutual aid or protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Although Barrett was employed at the time Respondent filed suit against him, the language of the Section 2(3) does not exclude Barrett from the definition. Because Barrett and Johnston both fall within the definition of employee, their discussions about the suit were concerted.

## ii. Protected activity

The concerted activity was protected, or at least perceived so by Respondent. The terminating offense is Johnston’s involvement with Respondent’s lawsuit against Barrett. *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000), enfg. 327 NLRB 13 (1998), is persuasive. Employees filed against their employer a civil suit regarding safety concerns. The employer contended the employees were disloyal by filing suit. The court, affirming the Board, found the employees were engaged in protected concerted activity in filing a civil action. *Mohave*, 206 F.3d at 1189–1190.

Although the suit here was filed by Respondent, Respondent believed Johnston was assisting Barrett in defending his suit. However, Respondent states its focus on Barrett was due to “the potential that he had unauthorized access to confidential data.” (R. Br. at 14). Respondent’s claim that Barrett was not involved with a protected issue rings hollow when the

lawsuit maintains he potentially had information about wages and Barrett already denied any personal access to such information. As previously noted, discussions about wages are inherently concerted. Ironically, Respondent was able to pull information from its computers on the day of hearing about Johnston's activities, but never presented any information about Barrett's alleged access.

The actions were also concerted as Respondent might similarly target Johnston or another employee in a suit. See generally *Fresh and Easy Neighborhood Market*, supra.<sup>13</sup> Surely employees can join together "for mutual aid and protection" to defend against an employer's suit against an employee regarding terms and conditions of employment, such as allegedly discussing wages, as much as filing suit against an employer.

Respondent specifically cited two cases to support its position. In examining *Schlitz*, 211 NLRB 799, the case is differentiated on its facts. The individual who was allegedly terminated under Section 8(a)(3) and (1) was a secretary-receptionist. The Board agreed with the employer that the individual was unsuitable for the position because she screened phone calls and questioned whether she tried to obtain confidential information about labor relations matters. *Id.* In comparison, Johnston did not screen any calls and only had conversation with Vining, who apparently answered no questions but questioned her. Respondent's notes show that it believed Johnston was trying to find out more information from Vining about Barrett's suit. However, Respondent's evidence does not show how Johnston attempted to obtain information to pass along to Barrett. The notes do not reflect any access to confidential information. (GC Exh. 11). Schweda characterized Johnston's involvement with the lawsuit against Barrett as "gossiping," but said nothing about trying to obtain confidential information.

To support its position that Johnston was correctly terminated, Respondent also cited *Flex Frac Logistics, LLC*, 360 NLRB No 120 (2014). Pursuant to an analysis of the employee's actions, the administrative law judge found and the Board affirmed that the employee's termination did not violate the Act. However, the analysis was based upon whether the discipline was issued for a violation of an unlawfully overbroad rule. *Id.*, citing *Contintenal Group*, 357 NLRB 409 (2011). The terminated employee disclosed confidential information about client rates. However, Johnston did not release any confidential information; discussing Respondent's suit against Barrett was not apparently confidential as it was filed openly in a state court and Vining brought up the issue at least once.

### iii. Knowledge and animus

The facts also demonstrate that Respondent had both knowledge and animus towards the protected concerted activities. Respondent knew much about Johnston's relationship, and particularly about her involvement with the lawsuit. Vining repeatedly asked Johnston about trying to get in touch with Barrett to give an affidavit. When Johnston told Vining she had talked with Barrett about Respondent's suit against him and asked him questions, Respondent assumed that Johnston was acting as Barrett's advocate within the company.

---

<sup>13</sup> Also see *Wynn Las Vegas, LLC*, 358 NLRB 674, 679-680 (2012) (employees joining together to pay for litigation costs of another employee was protected concerted activity).

Animus specifically directed towards Johnston is apparent. Respondent provided specific reasons for terminating Johnston: Schweda told Johnston her loyalty was in question for talking with Barrett; and Schweda's August 18 email, which described only Respondent's reasons for terminating Schweda as possibly advocating for Barrett.

Timing also supports finding animus. Respondent tolerated alleged poor performance for well over a year. However, when it learned of Johnston's involvement with Barrett about the lawsuit, Respondent decided to terminate her within five days. *Alternative Entertainment*, 363 NLRB No. 131, slip op. at 10 (2016); *Nu Dawn Homes*, 289 NLRB 554, 558 (1988).

Shifting defenses or reasons for an employer's adverse employment action are persuasive evidence of discriminatory motive; it also serves as evidence of pretext. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014); *Naomi Knitting Plant, A Division of Andrex Industries Corp.*, 328 NLRB 1279, 1283 (1999), citing *York Products, Inc. d/b/a Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), enfd. 881 F.2d 542 (8th Cir. 1989). The reasons for termination offered at trial differed from what was set forth in the discharge conversation with Johnston and what Schweda set forth in her August 18 email. *City Stationery, Inc.*, 340 NLRB 523, 524 (2003). This shift in explanation is evidence of an unlawful motivation.

General Counsel has sustained the burden of showing that protected concerted activity was a motivating factor in Respondent's decision to terminate Johnston. The burden now shifts to Respondent to show, by a preponderance of evidence, it would have terminated Johnston in the absence of her protected concerted activity. *Alternative Entertainment*, 363 NLRB No. 131, slip op. at 9-10.

#### iv. Analysis of Respondent's reasons for terminating Johnston

I find that Respondent's explanations for terminating Johnston are pretextual. Three areas point to this conclusion: Respondent's summary of events leading to the termination, which serves as an admission and a shifting defense; minimal discipline for Johnston's long-term performance issues; and lastly, Respondent's ultimate failure to conduct a meaningful investigation, which includes failure to talk with Johnston, about the letter.

Respondent's own reports about Johnston's termination refer only to her relationship to Barrett and nothing about her alleged performance issues. (GC Exh. 18). As previously noted, Schweda's August 18 email report of Johnston's termination says nothing about terminating Johnston for working on a long document at her desk or her history of performance issues. Although Sarver mentioned Johnston's performance during the termination discussion, it was lost to Schweda's subsequent documentation, which also demonstrated its lack of importance. In addition, the August 18 email discusses events preceding August 12, the date Respondent contends that Johnston started working on the bridal letter. I therefore find that Respondent's true reason was stated in the August 18 email report, which makes no mention of performance issues. *Baker Elec.*, 317 NLRB 335, 339 (1995), enfd. 105 F.3d 647 (1997), cert. denied 522 U.S. 1046 (1998). As previously noted with animus, the shift in Respondent's reasons also show pretext.

Respondent also points to Johnston's historically poor performance, culminating with the August 12 letter, as the reason for termination. The record reflects that Respondent talked to Johnston about her troublesome behaviors but gave little discipline for it. Instead it gave her a \$1.50 per hour raise in May, about 3 months before termination. Respondent's minimal treatment of her alleged misconduct and the raise demonstrate Respondent did not find the behaviors as troublesome as it claims; instead, Respondent had a high tolerance for Johnston's attendance and performance issues. *Phillips Petroleum Co.*, 339 NLRB 916, 919 (2003).

Respondent failed to conduct a meaningful investigation and to give Johnston an opportunity to explain, both of which demonstrate discriminatory intent. *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015), *enfg.* 357 NLRB 1632 (2011); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). Regarding the alleged conduct on August 12, Respondent conducted a late investigation into what Johnston was doing at her desk. First, Schweda did not actually see the document in question until after Johnston was terminated. In addition, Respondent obtained the letter's document and email history on the day of hearing. Respondent's investigation demonstrates that Johnston was likely working on the letter during working time. However, the computer "forensics" presented at hearing instead demonstrate that, on August 12 and 13, Respondent was not sure of what Johnston was doing on her computer. It also shows Respondent did not perform much of an investigation, if any, into the letter blamed as Respondent's last straw with Johnston. Respondent provided no explanation for waiting 7 months to make an investigation of Johnston's document history. Neither Schweda nor Sarver asked Johnston what she was doing or redirected her to perform her work. Respondent's reliance upon the August 12 bridal dress letter became an afterthought for Respondent's termination, rather than the true reason. *Signature Flight Support*, 333 NLRB 1250, 1250-1251 (2001), *affd.* 31 Fed.Appx. 931 (11th Cir. 2002).

Because of these pretexts, Respondent does not prove that it would have terminated Johnston regardless of her protected concerted activities.

#### d. Conclusion regarding Johnston's termination

I find that Johnston was terminated for her protected concerted activity. The protected concerted activity is her involvement with former employee Barrett and discussions regarding Respondent's lawsuit, involving potential disclosure of wages. Respondent believed Johnston was acting as Barrett's advocate and found this conduct "disloyal." Respondent's stated reason for termination, Johnston's poor performance, is pretextual: Respondent shifted from the discussions with Barrett as the sole reason mentioned for termination to performance; Respondent failed to conduct a timely investigation into the last action of alleged poor performance and gave little discipline for the performance issues it identified. Therefore, Johnston's termination violated Section 8(a)(1) of the Act.

### CONCLUSIONS OF LAW

1. Respondent Andronaco, Inc. d/b/a Andronaco Industries, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent admits, and I find, that the following persons are supervisors within the

meaning of Section 2(11) and/or agents within the meaning of Section 2(13):

Ron Andronaco	CEO and President
Scott Palmettier	Chief Financial Officer
Colin Cruttenden	Plant Manager
Cheryl Sarver	Human Resources Director
Kaila Schweda	Executive Assistant
Rick Vining	I/T Supervisor

3. Respondent violated Section 8(a)(1) by maintaining the following overly broad rules in its handbook:

- a. Confidentiality;
- b. Solicitation/Distribution;
- c. Dress Code; and,
- d. Internet/Email and Reporting requirements.

4. Respondent violated Section 8(a)(1) when it told Lindsey Ball Johnston that she was disloyal for her protected concerted activities or its perception that she engaged in protected concerted activities.

5. Respondent violated Section 8(a)(1) by terminating Lindsey Ball Johnston for protected concerted activities and its perception that she was engaged in protected concerted activities.

6. Respondent did not violate the Act in any other manner alleged in the complaint.

#### REMEDY

Pursuant to *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), Respondent may comply with the Order by rescinding the unlawful provision and republishing its employee handbook without it. However, republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with a handbook insert stating that the unlawful rule has been rescinded, or with a new and lawfully worded rule on adhesive backing that will cover the unlawfully broad rule, until it republishes the handbook either without the unlawful provision or with a lawfully-worded rule in its stead. Any copies of the handbook that are printed with the unlawful rule must include the insert before being distributed to employees. See *2 Sisters Food Group*, 357 NLRB 1816, slip op. at 8 fn. 32 (2011); *Guardsmark*, 344 NLRB at 812 fn. 8.

Respondent shall make whole Lindsey Ball Johnston for any losses, earnings, and other benefits that she suffered as a result of the unlawful termination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate Johnston for any adverse tax consequences of receiving a lump-sum backpay award. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Additionally, in accordance with the Board's decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall be ordered, within 21 days of the dates the amounts of backpay are fixed, either by agreement or Board order, to submit and file the appropriate documentation allocating the backpay awards to the appropriate calendar quarters or periods (reports allocating backpay) with the Regional Director. Respondent will be required to allocate backpay to the appropriate calendar years only. The Regional Director then will assume responsibility for transmission of the reports to the Social Security Administration at appropriate times and in the appropriate manner.

General Counsel also seeks an order requiring that the Respondent reimburse Johnston for out-of-pocket expenses she may have incurred while searching for work regardless of whether she received interim earnings for a particular quarter. Discriminatees are entitled to reimbursement for expenses incurred in their search for interim employment. However, at present, Board law considers such expenses as an offset to a discriminatee's interim earnings, rather than calculating them separately. *West Texas Utilities Co.*, 109 NLRB 936, 939 fn. 3 (1954). I am obligated to follow existing Board precedent in resolving the issues present in this case. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I shall deny General Counsel's request for this additional remedy of expenses incurred while searching for work.

### ORDER

Respondent Andronaco, Inc. d/b/a Andronaco Industries, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Maintaining a confidentiality agreement that prohibits or may reasonably be read to prohibit employees from disclosing information regarding wages, hours, or other terms and conditions of employment.

b. Maintaining an overly broad no-solicitation rule prohibiting employees from engaging in protected solicitation during non-work time in work areas.

c. Maintaining an overly broad no-distribution rule prohibiting employees from engaging in protected distribution during nonworking time and in nonworking areas and permitting only distribution of Respondent's literature.

d. Maintaining an overly broad dress code policy prohibiting employees from wearing clothes or insignia that display a protected message.

e. Maintaining an overly broad internet rule that has no restrictions regarding place and time, "copyright infringement," and defines "spam" as solicitation;

f. Maintaining an overly broad email rule;

g. Maintaining an unlawful reporting requirement for internet and email use;



h. Threatening employees that they are disloyal for participating in protected concerted activities;

5 i. Terminating employees for protected concerted activities; and,

j. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

10 2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days of the Board's Order, revise or rescind the following policies:

- 15 i. Confidentiality;  
 ii. Solicitation/distribution;  
 iii. Dress code, to the extent that it limits "offensive" messages; and,  
 iv. Email/Internet and its reporting requirements.

20 b. Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute revised handbooks that (1) do not contain the unlawful rule, or (2) provide the language of a lawful rule.

25 c. Within 14 days from the date of this Order, offer Lindsey Ball Johnston full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

30 d. Make Lindsey Ball Johnston whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, pursuant to the methods in the Remedy section of this decision.

35 e. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Lindsey Ball Johnston and within 3 days thereafter notify Johnston in writing that this has been done and that the discharge will not be used against her in any way.

f. Compensate Lindsey Ball Johnston for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the dates the amounts of backpay are fixed, either by agreement or Board order, reports allocating the backpay awards to the appropriate calendar year(s).

40 g. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

45

h. Within 14 days after service by the Region, post at its facility in Kentwood, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The notice will also be posted in English and any other languages that the Regional Director finds appropriate. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means if Respondent regularly communicates with employees through those means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 13, 2015.

i. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that Respondent has taken to comply.

Dated Washington D.C., April 20, 2016



Sharon Levinson Steckler  
Administrative Law Judge

## **APPENDIX**

### **NOTICE TO EMPLOYEES** **POSTED BY ORDER OF** **THE NATIONAL LABOR RELATIONS BOARD** **AN AGENCY OF THE UNITED STATES GOVERNMENT**

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

**WE WILL NOT** tell you that you are disloyal to the company because you engaged in protected concerted activities.

**WE WILL NOT** maintain unlawful rules regarding confidentiality, solicitation, distribution, dress code, internet and email access and reporting violations of the internet and email access policies.

**WE WILL NOT** discharge you because you engaged in protected concerted activities.

**WE WILL NOT**, in any like or other related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

**WE WILL** pay Lindsey Ball Johnston for the wages and other benefits she lost, with interest, because of our unlawful termination of her.

**WE WILL** offer Lindsey Ball Johnston immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges she previously enjoyed.

**WE WILL** remove from our files all references to the discharge of Lindsey Ball Johnston and **WE WILL** notify her in writing that this has been done and that the discharge will not be used against her in any way.

**WE WILL** compensate Lindsey Ball Johnston for the adverse tax consequences, if any of receiving on or more lump-sum backpay awards covering periods longer than 1 year.

**WE WILL** revise or rescind our unlawful rules regarding solicitation/distribution, confidentiality, dress code, internet use, email, and reporting violations of the internet and email policy and **WE WILL** notify you in writing that we have done so.

**Andronaco, Inc. d/b/a Andronaco Industries**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

**477 Michigan Avenue, Room 300, Detroit, MI 48226-2543**

**(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.**

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/07-CA-160286](http://www.nlrb.gov/case/07-CA-160286) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.